STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE A. WALK, Plaintiff-Appellant,	UNPUBLISHED November 15, 2011
v	No. 299925 Oakland Circuit Court
BAKER COLLEGE OF AUBURN HILLS, Defendant-Appellee.	LC No. 2009-104031-NO

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this premises liability action. Because the condition causing plaintiff's fall was open and obvious with no applicable exception, we affirm.

Plaintiff, a student at defendant school, was traversing a hallway at the school when she tripped and fell, incurring injuries. According to plaintiff, as she proceeded down the hall toward her class, the walker she was using caught on an impediment that caused her to fall, striking her face on the floor. Plaintiff initially contended that the impediment was either bunching of the carpet where the floor began to decline or two small squares in the center of the floor which appeared to be divots or holes for door pins. Plaintiff alleged that defendant was negligent in, among other things, failing to maintain the premises in a reasonably safe condition and failing to warn of a known hazard, and that such negligence led to plaintiff's injuries. Plaintiff further asserted that defendant improperly operated and maintained its premises such that it constituted a nuisance. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), contending that the condition causing plaintiff's fall was open and obvious and the trial court agreed. Specifically, the trial court found that plaintiff had essentially agreed that the door pin holes had caused her fall and the trial court found that because such holes were open and obvious, summary disposition was appropriate in defendant's favor.

This Court reviews a trial court's grant of summary disposition under MCR 2.116(C)(10) de novo. *BC Tile & Marble Co v Multi Building Co*, 288 Mich App 576, 583; 794 NW2d 76 (2010). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 582. In reviewing the motion, this Court must consider "the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich

274, 278; 681 NW2d 342 (2004). This Court, however, will only consider evidence that the parties "properly presented to the trial court before its decision on the motion." *BC Tile*, 288 Mich App at 583. Summary disposition is proper when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Plaintiff first argues that the trial court erred in finding that there was no genuine issue of material fact regarding whether the door pin holes in the floor presented an open and obvious danger, and that the trial court therefore erred in granting defendant's motion for summary disposition. We disagree.

In a premises liability case, the "plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atl & Pac Tea Co*, 274 Mich App 710, 712-713; 737 NW2d 179 (2007). The duty that a premises possessor owes depends on the visitor's status on the land as a trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). The parties do not dispute that plaintiff was in fact an invitee because of the business relationship that existed between plaintiff and defendant. See, e.g., *Hoffner v Lanctoe*, 290 Mich App 449, 452; 802 NW2d 648 (2010).

The premises possessor generally owes a duty to exercise reasonable care in protecting invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Kennedy*, 274 Mich App at 712-713 (citing *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001)). The premises possessor, however, is not an absolute insurer of the invitee's safety. *Id*. The premises possessor does not generally owe a duty to protect invitees from open and obvious dangers. *Id*. "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]'" *Id*. (quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993)). The test is objective, and this Court therefore looks to whether a reasonable person in the invitee's position would have foreseen the danger, not whether a particular invitee should have known of the danger. *Id*.

The trial court ruled, based primarily on pictures taken at the scene of the accident, that the door pin holes presented an open and obvious danger. Plaintiff argues on appeal that, because the hallway was crowded, and plaintiff's view of the floor was obstructed, the door pin holes that caused her fall were not open and obvious. Plaintiff primarily relies on two cases in supporting her argument that the crowded nature of the hallway prevented the door pin holes from being an open and obvious danger. In the first case, this Court held that evidence that a one-inch wire protruding from a metal basket at ankle height in a grocery store which caused a shopper to fall presented a question of fact regarding whether the condition constituted an open and obvious danger. *Price v Kroger*, 284 Mich App 496, 501-502; 773 NW2d 739 (2009). In reversing the trial court's dismissal, this Court noted the small size of the wire, its location near the floor, and the bulk of the metal basket, which impeded the invitee's visibility near floor level.

Id. Because these circumstances made it difficult to see the wire, this Court held that a jury could have found that a reasonable person would not notice it on casual inspection. *Id*.

Plaintiff next cites an unpublished opinion in which this Court held that a premises possessor may be liable for a plaintiff's injury caused by an obvious danger if "'the possessor has reason to expect that the invitee's attention may be distracted.'" *Hanna v Wal-Mart*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2001 (Docket No. 219477) (unpub op at 4-5) (quoting 2 Restatement Torts, 2d, § 343A, p 220, comment f). In *Hanna*, the plaintiff fell after tripping on a crease in a mat on the floor, which she could not see because the store was busy with other shoppers and children. *Id*. The defendant knew that the mat sometimes became bunched, and that the store was busy in that area at the time of the accident. *Id*. The Court held that the plaintiff, therefore, created an issue of fact regarding whether the mat presented an unreasonable danger. *Id*. at 4.

Defendant responds by citing two cases that hold that mere distractions are insufficient to prevent application of the open and obvious doctrine. In *Lugo*, 464 Mich at 522, the Supreme Court held that a person walking in a parking lot, who fell into a normal pothole, could not maintain a premises liability action when the uncontroverted evidence showed that she did not see the hole because she was watching vehicles driving by front of her. There was nothing "unusual" about the pothole, and therefore, the special aspects exception to the open and obvious doctrine did not apply. *Id*. at 522-523. The Court, therefore, held that the trial court correctly dismissed the plaintiff's claim.

Similarly, in *Kennedy*, this Court held that "mere distractions are not sufficient to prevent application of the open and obvious danger doctrine." *Kennedy*, 274 Mich App at 716. In *Kennedy*, a shopper in a grocery store slipped on crushed grapes on the floor. *Id*. at 712. The grapes were readily apparent to anyone who walked by, but the plaintiff did not see them because he was looking at a display or merchandise. *Id*. at 717. This Court held that, consistent with *Lugo*, the plaintiff's failure to notice a danger in an open and obvious place, if only because of a normal distraction, did not preclude application of the open and obvious doctrine. *Id*. The plaintiff's claim, therefore, failed as a matter of law. *Id*.

Notably, "if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (emphasis in original). A plaintiff may not recover if the condition is "so common that the possibility of its presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect . . . it." *Id*. at 615 (quoting *Garrett v Butterfield Theatres*, 261 Mich 262; 246 NW 57 (1933)).

We agree that a reasonably prudent person would anticipate the door pin holes in an area that passes through double-doors. As the trial court noted, the door pin holes in this case are plainly visible and commonplace in institutional settings around fire doors. This Court has previously held that a reasonable person would anticipate steps and differing floor levels in a building, and we similarly hold in this case that a reasonable person would anticipate door pin holes where doors are located. See *Bertrand*, 449 Mich at 614-615.

In this case, plaintiff, who has multiple sclerosis, walked with the aid of her walker in a crowded hallway, through fire doors, and down a slope. Although this situation may have presented an unreasonable risk to this specific plaintiff, we consider only whether the situation presented an *objectively* unreasonable risk. *Kennedy*, 274 Mich App at 713. Because no reasonable jury could find that the door pin holes presented an unreasonable risk to the average person, defendant owed no duty to plaintiff to protect her from the door pin holes.

We also reject plaintiff's argument that the door pin holes were effectively unavoidable, preventing application of the open and obvious doctrine. "The open and obvious doctrine will not preclude liability where there are 'special aspects' to the open and obvious condition that create an unreasonable risk of harm." *Lugo*, 258 Mich App 232-233. A condition creates an unreasonable risk of harm where, although open and obvious, the condition is effectively unavoidable, i.e., when the plaintiff was "effectively forced to encounter the condition." *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002). A condition is not effectively unavoidable when a plaintiff could have used an available, alternative route to avoid the condition. *Id*. at 242.

In this case, the pictures show that the hallway provided plaintiff with ample room to walk to the side of the door pin holes. She could also have used an alternative entrance and hallway to reach her classroom. Because plaintiff was not effectively forced into encountering the door pin holes, she may not rely on this exception.

Plaintiff alternatively argues that a bump in the floor caused her fall, and that this Court should remand the case to determine whether defendant was negligent in maintaining the floor with the bump. When asked directly about plaintiff's theory of causation, plaintiff's counsel unequivocally indicated to the trial court that plaintiff planned to present evidence that the door pin holes caused her fall. Thus, plaintiff has waived any argument that a bump in the carpet caused her fall. Waiver is a voluntary and intentional abandonment of a known right. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). When asked which theory of causation plaintiff would present to the jury, plaintiff responded that she intended to present her prior statement that the holes that hold pins for the doors caused her fall and did not plan to argue that the bump in the floor caused her fall. Plaintiff, therefore, waived this argument. In any event, plaintiff did not present evidence to support her theory that a bump in the floor caused her fall.

To establish causation, a plaintiff must prove that the defendant's conduct was the cause in fact of the plaintiff's injury. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). "While plaintiffs may show causation circumstantially, the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation . . . ." *Id*. Plaintiff may not rely on speculation, but must point to a specific explanation of the cause of the injury. *Id*. In addition, a plaintiff may not create a triable issue of fact by producing affidavits that contradict her prior deposition testimony. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). While a plaintiff may rely on alternative theories of causation, the plaintiff must support each theory with admissible evidence, and may not rely on conjecture or speculation. *Skinner*, 445 Mich at 164. As our Supreme Court explained in *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956):

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Here, plaintiff first produced deposition testimony that a bump in the floor caused her accident. After reviewing the medical records, she found that she previously told medical personnel at the emergency room that the door pin holes caused the fall. She then filed an affidavit consistent with this theory, and indicated to the trial court that she would rely on this theory to support her claim. Because she indicated that she would proceed on the theory that the door pin holes caused her fall, and she did not present any evidence independent of her own testimony that the bump on the floor caused her fall, she has not presented sufficient evidence to support this theory, and defendant is entitled to judgment as a matter of law on this issue.

Plaintiff finally argues that defendant is liable because it breached its statutory duty of care by violating a MIOSHA building code, and that the breach of this duty caused her injury. AACS R 408.10021(3) provides that "[a] floor shall be maintained free of holes, loose boards, and protruding objects which would be a hazard to an employee." Plaintiff argues that defendant's maintenance of the door pin holes violated this regulation.

Generally, "the violation of a statute creates a rebuttable presumption of negligence, and the violation of an administrative regulation constitutes evidence of negligence." *Kennedy*, 274 Mich App at 721. MIOSHA and the regulations enacted under MIOSHA, however, apply only to the relationship between employers and employees and thus do not create duties that run to third parties. *Id*. Plaintiff failed to present any evidence that defendant ever employed her. Plaintiff, therefore, presented insufficient evidence to rely on MIOSHA, or its regulations, as a statutory duty of care in this case.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens